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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner

vs.

STATE OF NORTH CAROLINA,
Respondent

BRIEF AMICUS CURIAE

Amicus Curiae Pro Se
Richard A. Heim
53 Windsor Avenue
Vernon, Connecticut

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of the Court dated
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Counsel of Record:
For Petitioner:
David E. Kendall
10 Columbus Circle
N.Y.C., N.Y.

For Respondent:
Office of Attorney General
James Carson, Jr.
P. O. Box 629
Raleigh, N.C.

INTEREST OF AMICUS CURIAE

Amicus curiae is a member of the Bar Association of the State of Connecticut and a practicing criminal law attorney in that state which has a recently enacted statute providing for the penalty of death (Conn. Gen. Statutes 53a-46). Amicus has a legal duty to promote justice and improve the legal system as well as to protect and defend the Constitution of the United States. The issues in this case being of such compelling public interest, Amicus seeks to execute said duty by functioning as friend of the Court.

ARGUMENT

I. DOES A DEATH PENALTY VIOLATE THE 8TH AND 14TH AMENDMENTS IN AND OF THEMSELVES AND WHEN CONSTRUED WITH CERTAIN RIGHTS RETAINED BY THE PEOPLE VIA THE 9TH AMENDMENT?

The preservation and furtherance of the welfare of the people is the aim of our Constitution, its sole purpose being to protect and improve the system in which those people are free to exercise their basic and fundamental rights to live, to have liberty, and to pursue happiness. All laws made to establish, maintain, and improve order and justice must embrace that sole purpose and no other. Justice is a consideration which our Constitution sets out in its very preamble. The right to life and to receive the benefit of the laws are the most basic and fundamental of the people. That every American has such rights is grounded in the very public policy of those people as expressed in our Declaration of Independence which declares that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

A law which allows for the execution of a hunan being for a crime violates the 8th and 14th Amendments because such measure goes beyond punishment within the legally proper meaning of that word implied therein as well as in the spirit of the entire Constitution. A penalty can be classified as not cruel and unusual and still violate the constitutional standard for the concept of punishment if its objectives are improper.

By the same token a penalty can be most cruel and unusual but still amount to punishment if the aims are proper. Imposition of a death penalty is merely a forfeiture of one's existence but it is not punishment. This Court has recognized six possible purposes behind any criminal penalty, those being correction, isolation, deterrence, retribution, eugenics and the economy. Of these considerations, only two are constitutionally valid as will be argued below. And if a particular penalty does not further one or both of these aims, it is not punishment in the constitutional sense. In the case of a penalty of death, if such aims are not met, the result is not only a violation of the 8th and 14th Amendment concepts of punishment, but also an infringement of the 9th Amendment fundamental rights to be corrected as a protection of the law and to have life itself.

The only constitutionally acceptable definition of punishment for crime is that which aims at individual correction and temporary protective isolation. Execution accomplishes no correction. It is purely an extermination. It amounts to a legislative mandate that certain criminals are beyond help and cannot and shall not be rehabilitated. Punishments cannot consist of measures which simply isolate or destroy persons dangerous to society for in one case the result is an aimless perpetual burden on the public revenue, and in the other a violation of the rights to live and to receive the law's help and protection through corrective procedures. Simple isolation or extermination are wasteful, non-constructive approaches and penalties must go farther than that. They must seek to correct those with propensities for wrongful conduct and this consideration must fall under the basic notion that all men are entitled to the protection of the law, equal protection aside. Can it not be said that the death penalty is equal to no protection at all? Is it not rightfully stated that such penalty falls outside the limits of the implied meaning of the word punishment in the 8th Amendment because that measure is excessive and disproportionate to any crime, and that it affords those executed no protection of the law whatsoever? Aside from the 9th Amendment rights to marital privacy or freedom of interstate travel, does it not seem elementary that the same amendment guarantees two much more basic rights to every American, those being the rights to be helped by the law in-

stead of erased from existence or totally ignored, and to simply stay alive? What is it about a penalty that makes it disproportionate or excessive? More stringent than needed for correction? It cannot mean more isolative than is necessary since no criminal should be returned to society while still possessing wrongful tendencies. It also cannot mean more vengeful or more of a deterrent example than is needed since those purposes are constitutionally improper as will be argued below. Considerations of eugenics and the economy are likewise improperly met by a death penalty.

That execution serves to remove the most dangerous criminals from the public and thereby promotes the general welfare and safety cannot be denied. But incarceration achieves a like result and hence renders the death penalty a measure which goes too far as well as one which ignores correction.

The penalty of death does satisfy the public desire for vengeance, but is that a valid object of any law? Are the tax revenues of the people to be used to carry out vengeance? Clearly this is not promotive of any legitimate governmental purpose. Such purpose must aim solely at improving public welfare and safety in a constructive manner and when applied to criminal penalties, includes protective isolation and restorative correction but certainly not retaliation.

It cannot be denied that the death penalty might act as a deterrent example for others to heed and therefore promotive of the general welfare. But is this a legally acceptable objective? Laws are made to preserve order and protect individual rights and everyone subject to those laws knows or is presumed to know of the standard of conduct required of them pursuant thereto and that any conduct outside that standard will not be tolerated by society and that steps will be taken to insure that behavior not meeting that standard will be made to conform in the future. The people are under a duty to obey the law out of respect for what it stands for and tries to accomplish, but not out of fear of reprisal. Deterrence is an incidental object of a penalty at best. While it may serve to show the public that wrongful conduct is dealt with in some fashion, this is nothing more than an exhibition of the workings of the legal process. But to impose a penalty with a primary objective of making others obey the law is an improper

use of that penalty. Making certain that a particular defendant will not break this particular law in the future is the only proper objective except for public protection during the corrective period. The reason behind this proposition is in the fact that our Constitution forbids governmental taking of private property for public use without just compensation. Can it then be argued that the same document allows taking of life as a penalty for crime in furtherance of deterring others from the same crime? Is this not a taking for a public purpose of something far more sacred than property without any compensation at all? I urge the Court that it is and as such violative of the 9th Amendment right to life, to be helped by the law, and the permissible standard for the concept of punishment implied in the 8th Amendment.

While it might be true that human eugenics are improved by extermination of those who could pass on criminal tendencies to their offspring, sterilization does the job just as well and therefore leads to the conclusion that a penalty of death meets this objective in an excessive way.

Economic considerations are furthered if some criminals are put to death since the public no longer has to support the wrongdoer or suffer from his misdeeds. But if he is properly corrected, there will be no more misdeeds. Public support of such criminal during the corrective period does take away funds which might be used for other purposes, but there is no alternative when the basic rights to live and not to be shunned or left without the protection and help of the law are brought into view. Even if some criminals absolutely cannot be corrected, the right to remain as a living human being, albeit permanently incarcerated, demands that the public revenues be used for that purpose.

Finally, that the Court should consider constitutional issues not raised below or presented on appeal by the parties can be supported by the fact that it has the power to note a plain error not assigned and that protection from governmental invasion of the rights of the people should not be made to depend solely on the skill of their counsel. This Court must be the final overseer thereof.

II. CAN ARGUMENTS THAT A DEATH PENALTY IS UNCONSTITUTIONAL PER SE BE RECONCILED WITH THE SEVERAL REFERENCES IN THE CONSTITUTION WHICH SEEM TO IMPLY THAT IT IS VALID AND ALLOWABLE?

The 5th Amendment provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. To impose a literal meaning to "life or limb" would foreclose application of this guarantee to crimes punishable only by monetary fine. Clearly that is not the case because the guarantee applies to all crimes. Hence, the meaning of "life or limb" is figurative. It means interruption of one's life activities or life routine as a free citizen through incarceration and it means interruption of one's free use of property as in the taking of money in the form of a fine.

The 5th Amendment also contains the phrase "Capital, or otherwise infamous crime," the common definition of the word capital being "punishable by death." But does the use of this word sanction the imposition of death as a penalty? Hopefully it does not. The choice of the word capital was made simply to denote those types of crime which had traditionally been met with penalties of death in the past along with types considered "otherwise infamous." It was not used to imply that such penalty was in keeping with the fundamental rights of every American to life, to the aid and protection of the law, and to receive measures which constitute lawful punishments when criminally astray.

The 14th Amendment forbids any state from depriving any person of life without due process of law. It does not, nor does any other part of the Constitution, say that this is but one way of depriving a person of life. Rather, it commands that due process of law is the only way through which a state may so act. Is the imposition of a death penalty a due process of law deprivation if it follows a fair judicial proceeding? Taking liberty for a proper time or taking property (monetary fine) after a fair judicial proceeding would meet the due process mandate since, in addition to all else, these measures aim at correction and public protection (during incarceration). Such objectives make the deprivations due process ones. But taking of life as a criminal penalty does not correct the executed felon and goes overboard in public protection. Since no other legitimate objective exists, the death penalty amounts to a deprivation of life without due process of law. Examples of taking of life with due process will be given below. If we recognize that cruel and unusual punishments are prohibited to the states because they do not meet the due process concept of the 14th Amendment, can it not be rightfully argued that due process also requires that penalties for crime have objectives which are constructive and do not violate any other fundamental right retained by the people? Are not such objectives to be limited to individual correction and protective isolation, and are not any other purposes excessive, outside the declared public policy of the American people, contrary to the basic notions of fairness and human dignity, and violative of 9th Amendment rights?

What then are due process of law deprivations of life? Any that are necessary to prevent the loss of the right to life in others who are in immediate danger of such loss. Thus, the governmental slaying of one who criminally threatens instant grave or mortal harm upon another would be a due process of law deprivation. State legislative sanctioning of the abortion of a fetus of any age which medically imperils the life of the mother would be another example if that fetus were capable of sustaining life on its own, although this Court has ruled that such fetus is not a "person" under the 14th Amendment. It is only in these limited types of situations that human beings forfeit their rights to receive the law's protection and help and to life itself. And to those who would argue that such deprivations of life are merely police power exercises furthering public welfare and safety, it need only be pointed out that the Constitution forbids police power taking of life if that power is being exercised outside the due process of law limitation thereon. Hence, any state deprivation of life must be in keeping with the 14th Amendment mandate. The two cited examples do amount to due process takings because of the purpose behind each. But killing a person for a past criminal act which harmed the public is quite another thing.

Due process of law demands not only fair judicial proceedings and punishments which are not cruel and unusual,

but also proper and legitimate objectives of the process itself and if public protection and criminal correction are not the limit of those objectives, then the takings are not with the due process of law. Such things as loss of voting rights forever, or loss of liberty forever, or loss of life as a penalty for crime are not constructive, not corrective, not rehabilitory, not due process deprivations.

As a final observation, it should be pointed out that many states which have laws allowing for the death penalty delegate the duty of execution to the state department of corrections. Perhaps the name for such departments should be changed.

CONCLUSION

Amicus curiae respectfully urges the Court to find and declare that no state may impose a penalty of death for a crime under any circumstances because such penalty is repugnant to the rights of the people under the 8th, 14th, and 9th Amendments to the Constitution of the United States.

Dated December 3, 1974

Richard A. Heim
Counselor at Law
53 Windsor Avenue
Vernon, Connecticut